Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	

To: The Commission

COMMENTS OF HOME SHOPPING NETWORK, INC.

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March 31, 2008

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Home Shopping Network, Inc. ("HSN") a subsidiary of IAC/InterActiveCorp,[1] by its attorneys, hereby submits these comments in response to the Further Notice of Proposed Rulemaking in the captioned proceeding.

INTRODUCTION AND SUMMARY

HSN has for over 30 years offered television home shopping programming to consumers. Although HSN in recent years has expanded its business across a number of platforms, including the Internet, the cornerstone of the company remains its television home shopping service. It is in the context of this valuable service that HSN provides these comments.

In its *Report and Order and Further Notice of Proposed Rulemaking* in the Leased Commercial Access docket (2008 *Leased Access Order*), the Commission significantly lowered the maximum rates cable operators can charge unaffiliated programmers for the use of leased access channels. However, in a two-paragraph Further Notice of Proposed Rulemaking, the Commission proposed not to apply the lower, modified rates to "programmers that predominantly transmit sales presentations or program length commercials" ("direct sales

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[1] For convenience, HSN and its subsidiaries are referred to collectively herein as "HSN."

programmers"), and instead sought comment on whether cable operators should be permitted to charge direct sales programmers a higher leased access rate than the new modified rate made applicable to all other programmers.[2]

HSN strongly opposes the Commission's proposed differential leased access rate structure. For the reasons discussed below, the Commission should apply the same maximum leased access rate to all unaffiliated programmers, including direct sales programmers.[3]

Fundamentally, the differential rate structure under consideration in this proceeding would trigger serious concerns under the First Amendment. The proposal would impose a content-based restriction on commercial speech protected under the First Amendment, and in the absence of a compelling reason to do so. The Commission's purported concern about migration to leased access channels, which is the only stated basis for this discriminatory proposal, is simply that -- a concern, rather than evidence of actual harm. Furthermore, the Commission's overt reliance on program content as a proxy for programmers' ability to pay can not be justified under the First Amendment.

But even before reaching these constitutional infirmities, it is clear that the Commission's proposal is problematic because, as we describe below, a differential leased

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[2] HSN notes that, in a pending petition for judicial review, ValueVision Media, Inc., has challenged the 2008 *Leased Access Order* on the multiple grounds that it is arbitrary and capricious; contrary to the Communications Act, the Administrative Procedure Act and the Commission's rules; and unconstitutional. *See ValueVision Media, Inc. v. Federal Communications Commission*, Petition for Review, at 1 (D.C. Cir. filed March 11, 2008). HSN's submission of these comments does not, and should not be construed to, concede that the Commission had authority to issue the 2008 *Leased Access Order*.

[3] HSN consistently has taken the position that the Commission should treat direct sales programmers in a content-neutral and equitable manner, on par with all other programmers. *See* Comments of Home Shopping Network, Inc. in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket 92-266, at 2-4 (July 21, 1993) (opposing Commission's leased access pricing proposal that "erects artificial economic barriers for home shopping programmers with regard to [leased access] channels").

access rate scheme for direct sales programmers was expressly rejected, and repealed, after more than three years of real world experience in the television marketplace. The Commission has offered no justification for turning back the clock and effectively reinstating a differential pricing scheme; indeed, doing so would be contrary to the express purpose of the leased access regime as embodied in the Communications Act and the Commission's rules, to wit, to provide equal treatment of *all* unaffiliated programmers seeking access to a cable operators' leased access capacity. Moreover, the Commission's proposal arbitrarily and inexplicably targets a subset of sales programmers operating in a highly competitive television marketplace characterized by a wide variety of regularly scheduled sales and promotional programming on major broadcast networks, local television stations and satellite-delivered program services. Adopting the differential rate structure proposed in the *Further Notice* would disserve the public interest by limiting the ability of a specified class of programmers to contribute significantly to competition and diversity in the television marketplace.

Furthermore, the Commission's concern that making the modified leased access rates available to all programmers would result in "migration" of direct sales programmers to leased access channels is unsubstantiated and unwarranted. Here, also, the Commission has expressed similar concerns during previous iterations of the leased access proceeding, yet no material migration occurred. Even if the modified rate structure were to prompt an influx of new programmers to leased access channels, cable operators' ongoing transition to digital system architecture will ultimately ensure adequate capacity for all unaffiliated leased access programmers, including direct sales programmers.

I. ESTABLISHMENT OF A DIFFERENTIAL LEASED ACCESS RATE FOR DIRECT SALES PROGRAMMERS WOULD BE CONTRARY TO THE COMMUNICATIONS ACT AND WOULD DISSERVE THE PUBLIC INTEREST.

A differential leased access rate methodology that permits cable operators to charge direct sales programmers a higher maximum fee than all other programmers for the use of leased access channels would directly contradict the principles underlying the leased access regime. These principles—equality of application and promotion of use—can not coexist with a rate-setting methodology that deters access by some programmers while incenting it for others. Indeed, the Commission previously has considered, and ultimately rejected, a differential rate structure similar to the one proposed here. To resuscitate this failed approach would harm competition and diversity and perpetuate a system that has yet to demonstrate it is a viable carriage option for unaffiliated programmers.

A. The Express Purpose of the Leased Access Regime Mandates Equal Treatment of All Unaffiliated Programmers.

Both Congress and the Commission have concluded that the purpose of the leased access regime is to ensure that cable operators treat all programmers equally in order to promote competition and diversity in the television marketplace. Section 612 of the Communications Act provides that cable operators "shall designate channel capacity for commercial use by persons unaffiliated with the operator."[4] The statutory language applies to *all* unaffiliated programmers: Congress did not require or intend cable operators to make capacity available only to "some" or "certain" programmers. In addition, cable operators must extend to unaffiliated programmers the same contract standards, terms, and conditions that they make available to affiliated

[4] *See* 47 U.S.C. § 532(b)(1).

programmers.[5] Meanwhile, mandating a differential rate structure would be inconsistent with the principle that the Commission does "not intend . . . to infringe the freedom of contract" between cable operators and programmers.[6]

The Commission's stated intent that cable operators treat all programmers equally predates the current proceeding. During the proceedings to implement the leased access provisions of the 1992 Cable Act ("Cable Act proceedings"), the Commission rejected an argument that direct sales programmer commissions be included in its implicit fee calculation for leased access rates. The Commission stated, "we do not believe that [direct sales programmers] should be treated differently from other programmers," and, in particular, rejected as "unpersuasive" the argument that "[direct sales programmers] should be treated differently simply because of the 'fundamentally different economics of the home shopping market.'"[7] Yet that is now precisely what the Commission has proposed to do.

B. The Commission Previously Considered and Rejected a Differential Leased Access Rate Structure Based on Programming Categories.

The Commission seeks comment on a differential leased access rate structure for direct sales programmers despite the fact that, during the Cable Act proceedings, it extensively considered and ultimately rejected a similar structure based on programming categories. When

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[5] *See Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Leased Commercial Access, 2008 WL 294648, ¶ 24 (rel. Feb. 1, 2008) ("2008 *Leased Access Order*"). In the Notice of Proposed Rulemaking in this docket, the Commission expressly sought comment on whether the terms in leased access agreements are the same or similar to those that cable operators have with their programmers. *See Notice of Proposed Rulemaking*, in the Matter of Leased Commercial Access, 22 FCC Rcd. 11,222, ¶ 7 (2007) ("2007 *NPRM*").

[6] *Id.* at ¶ 25.

[7] *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking*, in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 11 F.C.C. Rcd. 16,933, ¶¶ 62, 74 (rel. March 29, 1996) ("1996 *Order on Reconsideration*").

the Commission first adopted rules in 1993 pursuant to the 1992 Cable Act's grant of leased access rate-setting authority, it suggested that it was "necessary to separate programmers seeking to lease commercial access channels into three distinct categories."[8] The Commission believed this separation was necessary in order to "achieve the potentially conflicting goals of Section 612"[9] of ensuring competition and diversity of programming while "not adversely affect[ing] the operation, financial condition, or market development of the cable system."[10] Under the "highest implicit fee" rate structure established by the Commission a cable operator could charge different maximum access rates for pay-per-event programming; home shopping programming; and all other programming.[11]

But the Commission noted in the 1993 *Report & Order* that "the rules we adopt should be understood as a starting point that will need refinement both through the rule making process and as we address issues on a case-by-case basis."[12] Less than three years later, the Commission questioned the utility of the differential rate structure, and ultimately eliminated programming categories from its rate-setting methodology.[13] In the 1996 *Order on Reconsideration*, as it considered replacing the "highest implicit fee" formula with a

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[8] *Report and Order and Further Notice of Proposed Rulemaking*, in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C. Rcd. 5631, ¶ 516 (rel. May 3, 1993) ("1993 *Report and Order*").

[9] *Id.*

[10] 47 U.S.C. § 532(a), (c)(1).

[11] 1993 *Report and Order* at ¶ 516.

[12] *Id.* at ¶ 491.

[13] *See* 1996 *Order on Reconsideration* (considering altering the leased access rate formula from a "highest implicit fee" structure to a "cost/market rate" formula); *Second Report and Order and Second Order on Reconsideration*, in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 12 F.C.C. Rcd. 5267 (rel. Feb. 4, 1997) (retaining a modified "average implicit fee" rate structure) ("1997 *Second Order on Reconsideration*").

"cost/market rate" formula, the Commission stated, "although *operators* are permitted to consider content of programming in determining the price, we believe that the *Commission* should not establish a separate maximum rate under the cost formula based on the content of the leased access programming."[14] Although the Commission again modified its rate-setting methodology in the 1997 *Second Order on Reconsideration*, it reiterated its decision to abolish distinctions based on programming:

> [W]e believe that it is appropriate to eliminate our current programmer categories for determining maximum rates for leased access programming that is carried on a tier. In the [1993 *Report and Order*], the Commission stated that the programmer categories were intended to reflect the different economies faced by the different types of programmers. We now believe, however, that basing maximum rates on the average value of the channel capacity is a more appropriate approach to implementing Section 612 than making distinctions based on the different economies among leased access programmers.[15]

The Commission emphasized that "all leased access programmers carried on a cable system's tier will be subject to the same maximum rate, which will be derived using all channels on the relevant tier(s), including channels devoted to direct sales programming (*e.g.*, home shopping networks and infomercials)."[16]

This history should be a guide: the Commission struggled to implement a formula for maximum leased access rates that would encourage the use of leased access channels by unaffiliated programmers without compromising the economic viability of cable systems. After more than three years of experience and analysis, the Commission concluded that it could balance these competing interests without reliance on a differential rate-setting methodology—whether through a "cost/market" formula or an "implicit fee" schedule. Although the

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[14] 1996 *Order on Reconsideration* at ¶ 74 (emphasis added).

[15] 1997 *Second Order on Reconsideration* at ¶ 49.

[16] *Id.*

Commission now has implemented a further modified "average implicit fee" structure to address the continued underutilization of leased access channels, nothing suggests that the absence of differentiated fees has either caused or even contributed to the perceived underutilization of this capacity.

C. Ensuring Non-Discrimination in Leased Access Rates for Direct Sales Programmers Promotes Competition and Diversity.

In addition to requiring cable operators to make leased access available to all unaffiliated programmers, the stated purpose of Section 612 "is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems."[17] Notably, the promotion of competition and diversity was not always the purpose of the leased access provisions. Congress added Section 612(a) in response to the Commission's 1990 Report on cable television rates and procedures ("1990 Cable Report"), in order to address concerns that some cable operators may have established unreasonable terms or had financial incentives to refuse to lease channel capacity to potential users.[18] The Commission's report had stated:

> Unless the purpose of Section 612 is modified to include the goal of promoting competition, the rate setting process would presumably continue to be constrained by language in the legislative history of the Cable Act to the effect that leased access is not intended "to adversely affect the cable operator's economic position." Rates, terms and conditions set according to such criteria are unlikely to facilitate vigorous competition by independent programmers to the services selected by the cable operator. . . . Although leased access was not designed to deal with the possible exercise of market power by cable operators vis-à-vis programmers, we believe that it is a promising alternative or supplement to the measures regarding programmer access to cable facilities discussed [in] this Report. *A new focus on promoting competition to the cable operator renders the*

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[17] 47 U.S.C. § 532(a).

[18] 1993 *Report and Order* at ¶ 489.

operators' discretion to set the leased access rates and conditions inappropriate.[19]

This change reflected Congress's concern that leased access rates should "encourage, and not discourage" the use of leased access channels,[20] and the Commission's statutory responsibility to "ensure that [leased access] channels are a genuine outlet for programmers."[21] It follows that the Commission can not implement a differential rate-setting methodology that would have as its express purpose discouraging direct sales programmers from utilizing the "genuine outlet" of leased access channels.

Any discriminatory rate-setting methodology also would directly harm the Commission's goals of ensuring a competitive and diverse leased access environment. The Commission has recognized that direct sales programmers are independent voices demonstrably serving viewer needs and contributing to diversity and competition on leased access channels. In a 1993 proceeding, the Commission concluded, in agreement with the "overwhelming majority of comments," that broadcast television stations presenting sales programming serve the public interest and qualify as local commercial television stations warranting mandatory cable carriage.[22] The Commission found that such stations have significant viewership and compete with non-broadcast services[23] while providing other public interest benefits: (1) they provide a

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[19] *Report*, In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C. Rcd. 4962, ¶¶ 179-80 (rel. July 31, 1990) (emphasis added) ("1990 Cable Report").

[20] H.R. Rep. No. 98-934, at 36 (1984).

[21] S. Rep. No. 102-92, at 79 (1991).

[22] *Report and Order*, In the Matter of Implementation of Section 4(c) of the Cable Television Consumer Protection and Competition Act of 1992; Home Shopping Station Issues, 8 F.C.C. Rcd. 5321, ¶ 3 (rel. July 19, 1993).

[23] *Id.* at ¶¶ 6, 22.

valuable service to people without the time or ability to purchase goods outside the home, such as the disabled, elderly, and homebound; (2) they fulfill public interest programming obligations; and (3) they help small or historically underperforming stations attain financial viability.[24]

Meanwhile, the types and sources of televised sales programming continue to expand in order to meet robust consumer demand. A growing number of foreign language and niche market direct sales programmers have entered the market in recent years. Leased access carriage is often the only way these new entrants, or regional or niche programmers, can reach potential viewers. It makes sense that these less established yet significantly diverse programmers would desire carriage on a cable operator's leased access channels. Yet the Commission's proposal, if adopted, would have the result of reducing or eliminating altogether their ability to contribute to diversity and competition in the video marketplace.[25]

Moreover, applying a discriminatory rate scheme to programmers that offer predominantly "commercial" programming is an inherently arbitrary exercise given the pervasive commercial nature of today's television marketplace. Numerous channels that do not predominantly offer "direct sales programming" are nonetheless replete with commercialized content aimed directly at home viewers.[26] For example, ABC's *Extreme Makeover: Home Edition* can fairly be described as an hour-long promotion of Sears tools and home furnishings, while Bravo's *Top Chef* instructs viewers how to prepare meals from ingredients found at Whole

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[24] *Id.* at ¶¶ 24, 28-36.

[25] *See also* notes 55-57 and accompanying text (discussing how the Commission's proposal is over-inclusive in that it also applies to direct sales programmers that can not afford the leased access rates).

[26] *See, e.g.*, Comments of Home Shopping Network, Inc., *in the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 93-8, at 11-13 (July 18, 2007).

Foods supermarkets (and to store any leftovers in Glad brand products). The commoditization of television programming is here to stay; discrimination against one type of commercial programmer is entirely arbitrary and, as discussed in Part III below, unconstitutional.

II. THE COMMISSION'S CONCERN ABOUT MIGRATION OF DIRECT SALES PROGRAMMERS TO LEASED ACCESS CHANNELS IS UNSUBSTANTIATED AND UNWARRANTED.

Throughout this proceeding and the previous Cable Act proceeding, the Commission has reiterated its goal to make leased access a viable option for both programmers and cable operators. In adjusting leased access rates it repeatedly has pointed to the underutilization of these channels and the imperative to encourage increased use. At the same time, the Commission has continued to express concern that making leased access "too attractive" could result in migration of direct sales programmers from other channels on a cable system. But notwithstanding the Commission's perennial concern, no material migration has occurred. Direct sales programmers already utilize leased access channels without any evidence of capacity constraints, and the expansion of cable systems' digital architecture will ultimately increase their capacity to handle any potential influx of leased access users.

A. Leased Access Channels Historically Have Been Underutilized by the Vast Majority of Unaffiliated Programmers.

The Commission for years has tried to make leased access an attractive option for unaffiliated programmers, who have continued to underutilize these channels despite the Commission's best efforts. The 1984 Cable Act required cable operators to designate a percentage of their channel capacity for commercial use by unaffiliated persons in order to ensure diversity of information sources "consistent with growth and development of cable

systems."[27] As the Commission found in its 1990 *Cable Report*, however, several factors, including rates and terms set primarily to protect cable operators' economic interests, had "retarded the overall development of leased access programming."[28] Congress amended Section 612 in the 1992 Cable Act to reflect the added purpose of enhancing competition on leased access channels.[29] Pursuant to that goal, the Commission then considered several rate-setting formulas with the intent of encouraging programmers to utilize the leased access tier, ultimately settling on an "average implicit fee" structure that it believed would best promote the dual purposes of Section 612.[30]

Despite the Commission's intense and extensive efforts, however, leased access channels consistently have been underutilized by unaffiliated programmers. As the Commission noted in the 2008 *Leased Access Order*, cable systems on average carry only 0.7 leased access channels, which in some cases may be an overstatement.[31] On the other hand, direct sales programmers have continued to utilize leased access channels.[32] It is unreasonable for the Commission now to seek to discourage direct sales programmers from using leased access, when

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[27] *Notice of Proposed Rulemaking*, in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 510, ¶ 144 (rel. Dec. 24, 1992) ("1992 *NPRM*").

[28] 1990 *Cable Report* at ¶¶ 13, 179.

[29] *See* n. 18, *supra* and accompanying text.

[30] 1997 *Second Order on Reconsideration* at ¶¶ 31, 49.

[31] 2008 *Leased Access Order* at ¶ 39. *See also* Comments of Shop NBC, in the Matter of Leased Commercial Access, MB Docket No. 07-42, at n.13 (Sept. 11, 2007) ("Even the .7 figure, which is self reported by cable operators, is likely overstated. It does not reflect whether channels are used on a full time basis, and it does not indicate whether carriage is at a negotiated rate, without regard to the average implicit fee.").

[32] *See* 2008 *Leased Access Order* at ¶ 67 and n. 195 (citing reports of major cable operators regarding the amount of leased access time devoted to direct sales programming on their systems).

for years they have been among the only programmers to take advantage of the leased access option -- and with plenty of capacity remaining for other programmers.

B. The Commission's Historical Concern that Lower Leased Access Rates would Result in Migration Has Not Materialized.

In the 1992 *Notice of Proposed Rulemaking* in the Cable Act proceeding, the Commission stated:

> [O]ne may speculate that if rates for leased access are low enough, unaffiliated programmers may seek to move their program offerings from other channels to those set aside for leased access, thereby diminishing the number of channels available for leased access without adding to the diversity of programming offered on the system. We seek comment on the probability of such migration occurring, the likely impact of such actions, and whether there is any need to take regulatory action at this time to prevent it.[33]

Then, in the 1993 *Report and Order* implementing the original "highest implicit fee" structure, the Commission rejected alternative benchmark or cost-of-service formulas in part out of concern that under those approaches "some migration to leased access is possible."[34] But three years later, in implementing the modified "average implicit fee formula," the Commission concluded that the record did *not* support the view that charging direct sales programmers the same rates as other programmers would enable them to dominate leased access capacity.[35] Thus, notwithstanding the current rehash of its migration hypothesis, the Commission previously has rejected migration arguments relating to its proposed leased access rate structures. And for good reason: no material migration has occurred.

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[33] 1992 *NPRM* at ¶ 161.

[34] 1993 *Report and Order* at ¶¶ 507, 510, 512-13 (citing various commenters that predicted migratory effects stemming from the Commission's proposed cost structures).

[35] *See* 1997 *Second Order on Reconsideration* at ¶ 49 and n. 123 (eliminating programmer categories despite commenters' arguments that "maintaining a separate category for direct sales programming would prevent home shopping networks and infomercial programmers . . . from dominating leased access capacity").

Even if direct sales programmers were to migrate in large numbers to a cable system's designated leased access channels, their relocation would make available capacity for new network entrants, thus further increasing the diversity of voices available on the cable system as a whole.[36] As the record in the Cable Act proceeding reflects:

> Migration is, in essence, competition to the cable operator. Giving programmers a second means of distribution will help discipline the bargaining process between operators and programmers. Migration will not adversely affect the financial condition or future development of the cable system per se. At a minimum, cable operators will be permitted recovery of their costs and a reasonable profit for leased access channels. What concerns the cable industry about competition from leased access channels is that it will bring an end to the unchecked monopoly profits they derive from packaging (i.e., bundling) programming. If the market dictates that it is to the benefit of programmers to pursue leased access rather than traditional carriage agreements, so be it. Relying on the marketplace to the fullest extent possible is also one of the policy goals of the 1992 Cable Act. . . . Furthermore, the number of channels which must be devoted to leased access is expressly limited under the Act. Ultimately, Congress' goal of diversity will be furthered by permitting the programming market to function more like a competitive market.[37]

Cable systems will ultimately have adequate capacity to accommodate a theoretical migration of direct sales programmers to leased access channels. The record in this proceeding demonstrates that at least 96 percent of all homes passed by cable offer digital cable services,[38] which include anywhere from 200 to 300 channels.[39] More than half of all cable

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[36] *See, e.g.*, Reply Comments of Consumer Federation of America, *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, at 78 (Feb. 11, 1993) ("Industry claims that migration does not further the goal of increased diversity of programming shows a myopic view of migration. Migration to leased access channels will free up channel capacity on systems which will make way for new programming.") ("CFA Reply Comments").

[37] CFA Reply Comments at 77-78.

[38] Comments of Shop NBC at 8 (citing Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503, ¶ 51 (2006) (2004 data)).

customers now subscribe to digital services, and digital penetration is continuing to increase significantly.[40] As cable systems implement digital technology, their aggregate bandwidth will increase -- and, with it, the capacity available for leased access programming.[41] The record shows that the "ever increasing capacity of cable systems with their digital channel tiers suggests that no substitution of channels may be required; the leased access channels will just be added to the lineup."[42]

III. THE COMMISSION'S PROPOSAL IS CONSTITUTIONALLY INFIRM.

The proposed differential rate structure would disserve the public interest in competition and diversity and arbitrarily discriminate against a subset of unaffiliated programmers. As shown below, it also collapses beneath the weight of constitutional concerns. Simply stated, the Commission's proposal would impose an impermissible content-based restriction on protected commercial speech.

A. HSN's Programming is Protected Speech under the First Amendment.

Direct sales programming—in which viewers are encouraged to purchase advertised goods and services—is a form of commercial speech.[43] The First Amendment

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[39] *Id.* (citing M. Arden & S. Schatt, Cable Television Infrastructure: Headend, Plant, Spectrum, Backhaul, STB and Revenue Analysis, ABI Research (2007) (noting 300 digital channels in a typical 750 MHz system)).

[40] *Id.* (citing http://www.ncta.com/ContentView.aspx?contentId=58). Comcast recently noted that it "has every intention of migrating its cable systems to all-digital networks." *See* Application for Review at 20 (Jan. 20, 2007) (CSR-2012-Z; CS Docket No. 97-80).

[41] *See* 47 U.S.C. 532(b)(1)(A)-(D) (providing, e.g., that a cable system with over 100 channels must devote 15 percent of its system to leased access). Thus, if a system's channel capacity doubles, so too will its corresponding leased access capacity because the statutory set aside remains a constant percentage.

[42] Shop NBC Notice of *Ex Parte* Presentation at 4-5.

[43] *See, e.g., Trudeau v. New York State Consumer Protection Bd.*, 2006 WL 1229018, *18 (N.D.N.Y. 2006) (noting that, in the proceeding below, the judge "did not decide whether the (continued...)

protects commercial speech. Indeed, the U.S. Supreme Court has recognized that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[44] Consequently, government restrictions on commercial speech are impermissible unless they satisfy a four-part test: (i) the speech concerns a lawful activity; (ii) the speech is not misleading; (iii) there is an important government interest in the restriction; and (iv) the restriction is not more extensive than necessary to advance that interest.[45]

Direct sales programmers' speech meets the first two *Central Hudson* requirements: it concerns lawful activity and is not misleading. However, the Commission's proposed differential rate structure does not satisfy the last two requirements. Although the Commission may have an important interest in protecting the viability of cable systems,[46] it has not shown that charging equal leased access rates to direct sales programmers will pose a genuine threat of harm to cable operators. Instead, throughout this proceeding and the Cable Act proceeding the Commission assumes the problem it purports to address—that migration of direct sales programmers will occur to the detriment of cable operators' economic viability. As discussed in Part II.B. above, however, no material migration has occurred. The Commission's

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infomercial [at issue] was core or hybrid speech as there was no dispute that it was commercial speech").

[44] *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 765 (1976). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) ("[T]he free flow of commercial information 'is indispensable to the proper allocation of resources in a free enterprise system.'") (quoting *Va. Bd. of Pharmacy*, 425 U.S. at 765).

[45] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

[46] The Commission also has a stated interest in increasing the use of leased access channels, but it proposed the higher leased access rate for direct sales programmers to address its interest in preventing migration.

proposed differential rate structure is based on mere speculation rather than an actual demonstration of real, identifiable harm.[47]

B. The Commission's Proposal Would Impose a Content-Based Restriction on Protected Speech.

Not only is the Commission's proposed differential rate structure vulnerable under the four-part *Central Hudson* test for restrictions on commercial speech, but also, and more fundamentally, it will impose a content-based restriction on speech.

The Commission acknowledges that its proposed leased access rate methodology and maximum leased access rate would not apply to programmers that "predominantly transmit sales presentations or program length commercials."[48] This is a classic content-based restriction on speech.[49] Cable operators by necessity *must* consider the content of a direct sales program in determining whether, in fact, the program is of the type that offers direct sales services. The Commission's proposal thus falls under the ban on content-based restrictions on speech.

C. Content-Based Restrictions on Speech are Presumptively Unconstitutional.

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[47] *See, e.g., Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994) (noting that, in imposing restrictions on commercial speech, "'mere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree'") (citations omitted); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985) (noting that a State's "unsupported assertions" were insufficient to justify a commercial speech prohibition because "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force").

[48] 2008 *Leased Access Order* at ¶ 74.

[49] *See, e.g., Arkansas Writers Project v. Ragland*, 481 U.S. 221, 231 (1987) (striking down a content-based tax exemption that applied to newspapers, sports, and religious publications, but not to general interest magazines).

Content-based regulations of speech are presumptively invalid.[50] The U.S. Supreme Court has stated that the "government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[51] Such market manipulation will occur here if the Commission instructs operators to charge direct sales programmers higher rates than other unaffiliated programmers. Direct sales programmers will be discouraged from entering the leased access marketplace, a position they have consistently held since the implementation of the leased access regime.[52]

Content-based regulations are subject to strict scrutiny under the First Amendment, and will be struck down unless they are necessary to serve a compelling government interest and narrowly drawn to achieve that end.[53] But the Commission has not demonstrated that there is a compelling interest in preventing a theoretical migration of direct sales programmers to cable operators' leased access channels. At most, the Commission harbors an unverified suspicion that something that has not occurred will suddenly materialize. Content-based restrictions on commercial speech cannot be justified on the basis of such speculative harm, nor are the proposed leased access rates "narrowly tailored" to serve such a tenuous and uncertain "interest."[54]

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[50] *See, e.g., RAV v. St. Paul*, 505 U.S. 377, 382 (1992) (citing cases). *See also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its ideas, its subject matter, or its content.").

[51] *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

[52] *See* Part II.A., *supra* discussing the historical utilization by direct sales programmers of the leased access system.

[53] *See Arkansas Writers Project,* 481 U.S. at 231 (noting that the State's content-based differential taxation rate for various magazine categories was subject to strict scrutiny).

[54] *See also* notes 55-57 and accompanying text (discussing how the Commission's proposal is both over- and under-inclusive).

The Supreme Court has been extremely reluctant to approve content-based restrictions on speech, no matter what their purported justification. In addition, the Court has rejected arguments that content-based restrictions are permissible if they serve as a proxy for some other characteristic. In *Arkansas Writers Project*, the Court rejected an argument that a tax exemption for newspapers, sports and religious magazines, but not general interest magazines, was justified as a means of protecting "fledgling" publications, noting that the restriction was both over- and under-inclusive.[55] There, the Court stated,

> Even assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption in [the statute at issue] of religious, professional, trade, and sports journals narrowly tailored to achieve that end. To the contrary, the exemption is both overinclusive and underinclusive. The types of magazines enumerated in [the statute] are exempt, regardless of whether they are "fledgling"; even the most lucrative and well-established religious, professional, trade, and sports journals do not pay sales tax. By contrast, struggling general interest magazines and struggling specialty magazines on subjects other than those specified in [the statute] are ineligible for favorable tax treatment.[56]

A similar argument applies here because the assumptions behind the Commission's rigid categories (direct sales programmers versus all others) will not always hold true. Some direct sales programmers may not be able to afford more than the proposed maximum leased access rates, and some non-direct sales programmers may be able to afford more than those rates.[57] Setting the rates based on home shopping content ignores the real issue that the Commission purports to address—ensuring that *all* programmers can afford access. The proposed differential rate structure is therefore not narrowly tailored to serve the Commission's interest in ensuring a viable leased access system.

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[55] *Arkansas Writers Project*, 481 U.S. at 232.

[56] *Id.*

[57] *See also* Part I.C, *supra*, discussing less established direct sales programmers.

The legislative history and text of Section 612 suggest that Congress believed cable operators may "establish rates, terms and conditions which are discriminatory,"[58] and current Section 612 provides that a cable operator may consider "content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person."[59] But Congress's "overriding goal in adopting [Section 612] is divorcing cable operator editorial control over a limited number of channels."[60] In light of that concern alone, Commission-mandated content-based restrictions do not survive constitutional scrutiny.

More fundamentally, Section 612 does not authorize the Commission to mandate content-based restrictions on speech, precisely because Congress cannot negate or modify the requirements of the First Amendment.[61] It is not surprising, then, that in his separate statement accompanying the 2008 *Leased Access Order* Commissioner McDowell stated, "I cannot fathom how distinguishing programmers based on the content they deliver can be constitutional." Simply stated, Congress's approval of *cable operators'* case-by-case pricing decisions does not give the *Commission* the authority to mandate that operators set content-based leased access rates

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[58] *See* Committee on Energy and Commerce, Report on the Cable Franchise Policy and Communications Act of 1984, Report No. 98-934, at 50-52 (Aug. 1, 1984) ("1984 House Committee Report").

[59] 47 U.S.C. § 532(c)(2).

[60] 1984 House Committee Report at 50.

[61] It is well settled that statutes should be interpreted, whenever possible, to avoid serious constitutional problems. *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (noting that courts apply the "reasonable presumption that Congress did not intend the alternative [interpretation] which raises serious constitutional doubts").

as a matter of law. [62] These obvious and well-founded constitutional concerns provide compelling additional reasons for the Commission to reject a differential leased access rate for direct sales programmers.

CONCLUSION

The Commission should not—and indeed can not, consistent with the First Amendment—adopt its proposed differential leased access formula instructing cable operators to discriminate against direct sales programmers on the basis of the content they provide. To do so would be contrary to the purpose of the leased access regime to provide equal treatment to all unaffiliated programmers and would harm the Commission's stated goals of ensuring competition and diversity on the leased access tier.

For all the reasons stated herein, the recently modified leased access rate methodology should be available to *all* unaffiliated programmers, regardless of the content of their services.

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[62] *See also* note 14 and accompanying text (discussing the difference between cable operators' freedom to contract for different rates on a case-by-case basis, and a government-imposed differentiated maximum rate for all direct sales programmers).

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March 31, 2008